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No. 00-1255

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Petitioner,

v.

HON. FRANK G. VOLLOR,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

MOTION FOR LEAVE TO FILE AND *AMICI CURIAE* BRIEF OF ALLIANCE FOR DEMOCRACY AND COMMON CAUSE/OHIO RESPECTING CERTIORARI

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MOTION FOR LEAVE TO FILE *AMICI* BRIEF RESPECTING CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, Alliance for Democracy and Common Cause/Ohio hereby submit this motion for leave to file the accompanying *amici curiae* brief addressing whether this Court should grant review of the two questions presented in the petition in this case.

The accompanying brief comports with the text and purpose of Rule 37 in that it "brings to the attention of the Court relevant matter not already brought to its attention by the parties." Specifically, the accompanying brief provides the Court with relevant information concerning an Ohio case that raises the same issue as the second question presented in the petition. Indeed, petitioner here (the Chamber of Commerce of the U.S.) is a party to the Ohio case as well, and the petition itself (at 19) refers to this Ohio case, albeit without detail. The Alliance for Democracy and Common Cause/Ohio are parties adverse to petitioner in the Ohio case and provide, in the accompanying *amici* brief, additional information about the Ohio case that may aid the Court in its consideration of the instant petition.

Because this Court has granted respondent until April 23 to file a response to the petition (and specifically requested respondent to do so), this motion and the accompanying brief are timely under Rule 37.2(a).

Respondent has consented to the filing of the accompanying brief, but petitioner has withheld consent.

For the reasons described above, the *amici* as movants here have a direct stake in the Court's disposition of the instant petition, since a grant of certiorari and decision on the merits concerning the second question presented in the petition would have a direct bearing on the Ohio case in which both the petitioner and the *amici* are parties.

Accordingly, this Court should grant this motion for leave to file the accompanying *amici curiae* brief.

Respectfully submitted,

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AMICI CURIAE BRIEF RESPECTING CERTIORARI

INTEREST OF *AMICI CURIAE*

Alliance for Democracy is a national organization, based in Boston, devoted to improving the democratic process throughout the United States. Common Cause/Ohio is the local chapter of a similar national organization, one which frequently appears before this Court as *amicus curiae* in cases concerning issues of campaign finance. Of particular relevance here is the participation of the two *amici* in administrative and judicial proceedings in an Ohio case similar to this one. The petition here (at page 19) refers specifically to this Ohio case, and a primary purpose of this *amici* brief is to provide this Court with additional information concerning the Ohio case, in order to aid the Court in its disposition of the petition.

Respondent has consented to the filing of this *amici* brief, but petitioner has not.*

ARGUMENT

In considering the petition, the Court should distinguish sharply between the two questions presented. The first question presented, concerning the validity of the temporary injunction already stayed by this Court (per Justice Scalia, in chambers), raises a question concerning the "prior restraint" doctrine. This Court should either deny review of the validity of this prior restraint, as respondent urges in his brief in opposition, or else summarily vacate the injunction on the ground that the record here does not disclose sufficient evidence to overcome the generally strong presumption against prior restraints under the First Amendment. *New York*

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* This brief was wholly authored by counsel for *amici curiae* listed on its cover, and no person or entity, other than the *amici curiae*, their members or their counsel, made a monetary contribution to the preparation or submission of this brief.

Times v. United States, 403 U.S. 713 (1971). In no event, however, should the validity of this prior restraint be set for argument, since the absence of a well-developed record concerning facts that might be relevant to the validity of the prior restraint (for example, whether respondent lacked an opportunity for counter-speech in the last few days before the election) makes this question unsuitable for such plenary review on this record.

The second question presented, by contrast, raises an important and unresolved issue of law concerning the meaning of "express electoral advocacy" under *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986). Although this question undoubtedly is worthy of this Court's plenary consideration in the abstract, it is not properly presented in the current posture of this case.

1. The petition's second question is not properly presented for one basic reason: if this Court were to determine that the prior restraint in this case is unconstitutional, anything that the Court might say regarding the meaning of "express electoral advocacy" under *Buckley* and *MCFL* would be pure dicta. This is true because, as is well-settled under the prior restraint doctrine, "a prior restraint may be struck down even though the particular expression involved could be validly restricted through subsequent criminal punishment or civil liability." Kathleen Sullivan & Gerald Gunther, *First Amendment Law* 335 (1999); see also *New York Times v. United States*, 403 U.S. at 733 (1971) (White, J., concurring) ("[F]ailure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal punishment.").

Applying this well-settled principle to the case at hand, it is altogether possible that the State of Mississippi has the authority to impose upon the Chamber of Commerce subsequent punishment or liability for failing to make

disclosures concerning the TV ads in dispute, on the ground that these ads are properly characterized as "express electoral advocacy" under *Buckley* and *MCFL*, even assuming the injunctions issued against the broadcasting of these ads were unconstitutional prior restraints. But only these injunctions are currently before the Court in this case: the judgment of the Mississippi Supreme Court that the petition asks this Court to review simply refused to stay one of these injunctions. Thus, this case does not properly present the question whether the State of Mississippi may impose subsequent punishment or liability for nondisclosure on the ground that the Chamber's ads were "express electoral advocacy."

This Court, moreover, will have ample opportunity to address this *Buckley*-related question in future cases. As the State of Mississippi itself observes in its own *amicus* brief respecting certiorari, this very question is currently pending before the Fifth Circuit in a declaratory judgment action brought by the Chamber itself. Although the mere existence of the Fifth Circuit case would not deprive this Court of jurisdiction here, were the same question properly presented on review of a judgment of the Mississippi Supreme Court, the key point is that this *Buckley*-related question is *not* properly presented on review of the state supreme court's judgment, but only in the Fifth Circuit case. Thus, surely it is appropriate for this Court to wait until it receives a petition to review the Fifth Circuit's judgment in order to address this *Buckley*-related question.

2. In addition, the same *Buckley*-related question is also squarely presented in a case currently pending in Ohio. The Ohio case also concerns ads sponsored by the petitioner here (the Chamber of Commerce of the U.S.) in connection with the election of candidates for seats on the State's supreme court. There were two seats of the seven-member Ohio Supreme Court up for election last November, and these races

were hotly contested, since that court had issued a series of controversial rulings—all by the same 4-to-3 majority—that were regarded by some as adverse to business interests in the State.

Ohio, like Mississippi, requires financial disclosure with respect to ads that qualify as "express electoral advocacy" under *Buckley* and *MCFL*. *See* Ohio Rev. Code 3517.10(G). In addition, Ohio, like Mississippi (and also Michigan), prohibits corporations to engage in such electioneering except through separate accounts funded by individuals and created specifically for that purpose. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); Ohio Rev. Code 3599.03(A). The Chamber aired three ads in Ohio that are alleged to have violated the State's disclosure and separate accounts requirements. (The Ohio case also involves a fourth ad sponsored by an organization apparently affiliated with the Chamber, but disclosure is necessary to determine the extent of their affiliation.)

One of these Ohio ads is an attack on the integrity of the incumbent justice, Alice Resnick, who wrote several of the Ohio Supreme Court's most controversial 4-to-3 decisions, and whom some large corporations in the State wished to defeat at the polls. The ad depicts Justice Resnick changing her vote in response to a letter received from a campaign contributor and specifically accuses her of letting her campaign contributors dictate the outcome of her vote in cases before the court.

The other two Chamber ads in Ohio are comparisons of the qualifications of the two competing candidates for each of the seats on the Ohio Supreme Court that were contested last November. One compares Justice Resnick with her opponent, Judge Terrence O'Donnell of the State's court of appeals. This ad quotes negative newspaper comments about Justice Resnick, compared with positive comments about Judge O'Donnell (as well as a "highly recommended" endorsement

from the Cleveland Bar Association), concluding that there are "big differences" between the two candidates.

Likewise, the third of the Chamber's Ohio ads compares the qualifications of the incumbent Justice Deborah Cook with her opponent, Judge Tim Black. (In contrast to Justice Rensick, Justice Cook is one of the 3-member minority on the court, and thus the corporate interests opposing Justice Resnick supported the reelection of Justice Cook.) This ad described Justice Cook as a well-qualified incumbent who had ruled on many important death penalty cases, while saying of her opponent that he was a municipal court judge who had never ruled on a death penalty case. Again, this comparative ad concluded that there were "big differences" between the two candidates. (The storyboards for the Chamber's three ads in Ohio are contained in an appendix to this brief.)

As in this Mississippi case, the Chamber claims that its Ohio ads are not "express electoral advocacy" under *Buckley* and *MCFL* solely because these do not contain certain specific words like "support" or "vote against." The Ohio Elections Commission has issued a split (4-to-3) decision, agreeing with the Chamber that *Buckley* and *MCFL* prevent the Commission from exercising jurisdiction over the Chamber's ads pursuant to Ohio law. Judicial proceedings to resolve this *Buckley*-related question are now pending in Ohio, and these proceedings eventually will make their way to this Court. (It is unclear at present whether the Ohio case will proceed in state or federal court: both the Commission and Chamber have taken the position that the state judiciary lacks the power to hear an appeal of the Commission's jurisdictional ruling on this *Buckley*-related question, and thus the question may be addressed in a federal-court declaratory judgment action comparable to the one now pending before the Fifth Circuit. Either way, this *Buckley*-related question will end up before this Court in a petition for certiorari from

Ohio that squarely presents the question whether the Chamber's ads are properly classified as "express electoral advocacy.")

Thus, the Ohio case will provide this Court with another opportunity to address the *Buckley*-related issue that is not properly before this Court on review of the instant judgment from the Mississippi Supreme Court. (The Ohio case does not involve the issue of a prior restraint.) Indeed, it might be considered that the Ohio case would present a particularly suitable vehicle for addressing this *Buckley*-related question because, if the kind of comparative ads that the Chamber sponsored in Ohio do not count as "express electoral advocacy," then the test under *Buckley* and *MCFL* truly is a limited set of specific words, as the Chamber contends. To put the point bluntly, an ad that explicitly asserted that "Joe Smith is better qualified to be elected Senator than Mary Jones" undoubtedly would count as express electoral advocacy under *Buckley* and *MCFL*. Consequently, a comparative ad that "in effect" says the exact same thing—by asserting that one candidate is well-qualified while the other is not, and concluding that there are "big differences" between the two candidates—should count as express electoral advocacy under the specific reasoning of *MCFL* (479 U.S. at 249). In any event, the fact that the Chamber of Commerce contends otherwise (and that the Ohio Elections Commission has divided 4-to-3 on this issue) shows just how well-suited this Ohio case is for clarifying the limits of the "express electoral advocacy" standard under *Buckley* and *MCFL*.

Accordingly, the existence of this Ohio case is an additional reason to deny certiorari on the *Buckley*-related question here.

CONCLUSION

Whatever the Court's disposition concerning the first question presented in the petition, the Court should deny certiorari on the second question presented.

Respectfully submitted,

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